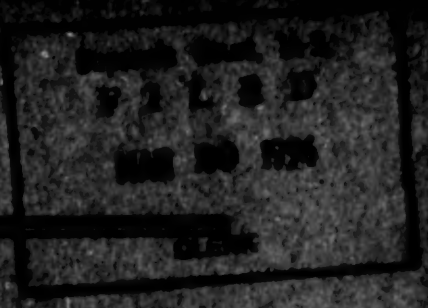

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

WESTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE LONG ISLAND SAVINGS BANK, FSB IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE LONG ISLAND SAVINGS BANK, FSB 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE RESPONDENTS HAVE VESTED CONTRACT RIGHTS RELATING TO THE RECOGNITION OF SUPERVISORY GOODWILL AND THE GOVERNMENT'S UNJUSTIFIED ABROGATION OF THOSE RIGHTS NECESSARILY GIVES RISE TO A VALID CLAIM FOR MONEY DAMAGES 5

A. The Government Granted Vested Contract Rights Concerning Goodwill in an Effort to Resolve a Financial Crisis and Avoid Government Obligations to Depositors of Failing Thrifts 5

1. The FSLIC's Strategy to Resolve the Thrift Crisis Included Encouraging Healthy Thrifts to Acquire Failing Thrifts 5

2. The FSLIC Acted Pursuant to Express Congressional Authority in Granting Respondents' Vested Contract Rights 8

B. The Respondents' Vested Contract Rights Concerning Goodwill Were Breached, for Which the Government Cannot Escape Liability 11

TABLE OF CONTENTS—Continued

	Page
II. THE SOVEREIGN ACTS DOCTRINE DOES NOT EXCUSE THE GOVERNMENT FROM LIABILITY BECAUSE FIRREA'S TERMS CONCERNING GOODWILL DO NOT UNAMBIGUOUSLY ABROGATE PRE-EXISTING VESTED CONTRACT RIGHTS AND THUS CANNOT BE GIVEN RETROACTIVE EFFECT	15
A. The "Clear Statement" Rule Concerning Retroactivity Is Applicable to the Construction of FIRREA	16
B. FIRREA Does Not Expressly Abrogate Vested Contract Rights Concerning Goodwill	21
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Baker v. Schofield, 243 U.S. 114 (1916)	13
Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988)	*passim*
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	*passim*
Brimstone R. Co. v. United States, 276 U.S. 104 (1928)	17
Carteret Sav. Bank, FA v. OTS, 762 F. Supp. 1159 (D.N.J. 1991)	12, 27
Carteret Sav. Bank, FA v. OTS, 963 F.2d 567 (3d Cir. 1992)	12, 27
Charter Fed. Sav. Bank v. Director, OTS, 773 F. Supp. 809 (1991)	27
Charter Fed. Sav. Bank v. OTS, 976 F.2d 203 (4th Cir. 1992)	12, 26
Chew Heong v. United States, 112 U.S. 536 (1884)	21
Claridge Apartments Co. v. Commissioner, 323 U.S. 141 (1944)	17
De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953)	23, 24
Estate of Samuel E. Bogley v. United States, 206 Cl. Ct. 695 (1975)	26
Far West Fed. Bank, SB v. Director, OTS, 738 F. Supp. 1559 (D. Or. 1990)	11, 26
Far West Fed. Bank, SB v. Director, OTS, 746 F. Supp. 1042 (D. Or. 1990)	12, 26
Far West Fed. Bank, SB v. Director, OTS, 951 F.2d 1093 (9th Cir. 1992)	11, 27
Flagship Fed. Sav. Bank v. Wall, 784 F. Supp. 742 (S.D. Cal. 1990)	12
Franklin Fed. Sav. Bank v. Director, OTS, 1990 U.S. Dist. LEXIS 20147 (E.D. Tenn. 1990)	12, 26
Franklin Fed. Sav. Bank v. Director, OTS, 927 F.2d 1332 (6th Cir.), *cert. denied*, 112 S. Ct. 370 (1991)	12, 26
Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U.S. 271 (1949)	13
Greene v. United States, 376 U.S. 149 (1964)	17

TABLE OF AUTHORITIES—Continued

	Page
Guaranty Fin. Servs., Inc. v. Director, OTS, 742 F. Supp. 1159 (M.D. Ga. 1990)	11, 26
Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991)	11, 12, 27
Hansen Sav. Bank v. OTS, 758 F. Supp. 240 (D.N.J. 1991)	12, 26
Horowitz v. United States, 267 U.S. 458 (1925)	14, 15
Jones v. United States, 1 Cl. Ct. 383 (1965)	14
Landgraf v. USI Film Prod., 114 S. Ct. 1483 (1994)	*passim*
Lynch v. United States, 292 U.S. 571 (1934)	14
Miller v. United States, 294 U.S. 435 (1935)	17
Murray v. Gibson, 15 How. 421 (1854)	20
National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987)	18
NLRB v. Healthcare & Retirement Corp., 114 S. Ct. 1778 (1994)	28
O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994)	25
Perry v. United States, 294 U.S. 330 (1935)	14
RTC v. FSLIC, 25 F.3d 1493 (10th Cir. 1994)	30
Schwab v. Doyle, 258 U.S. 529 (1922)	20, 29
Security Fed. Sav. Bank of Florida v. Director, OTS, 747 F. Supp. 656 (N.D. Fla. 1990)	12, 26
Security Sav. and Loan Ass'n v. Director, OTS, 761 F. Supp. 1277 (S.D. Miss. 1991)	12, 26
Sinking-Fund Cases, 99 U.S. 700 (1878)	14
Statesman Sav. Holding Corp. v. United States, 26 Cl. Ct. 904 (1992)	11
Sterling Sav. Ass'n v. Ryan, 751 F. Supp. 871 (E.D. Wash. 1990)	12, 26
The Long Island Sav. Bank, FSB, et al. v. United States, 92-517C	2
The Twenty Per Cent Cases, 87 U.S. (20 Wall.) 179 (1883)	21
Transcapital Fin. Corp. v. Director, OTS, 44 F.3d 1023 (D.C. Cir. 1993)	27

TABLE OF AUTHORITIES—Continued

	Page
Transohio Sav. Bank v. Director, OTS, 967 F.2d 598 (D.C. Cir. 1992)	18, 27
United States Fidelity & Guar. Co. v. United States, 209 U.S. 306 (1908)	21
United States v. Heth, 3 Cranch 399 (1806)	20
United States v. Johnston, 268 U.S. 220 (1925)	13
United States v. Magnolia Petroleum Co., 276 U.S. 160 (1928)	17
United States v. O'Donnell, 303 U.S. 501 (1938)	13
United States v. Security Indus. Bank, 459 U.S. 70 (1982)	21
Winstar Corp. v. United States, 21 Cl. Ct. 112 (1990)	11
Winstar Corp. v. United States, 25 Cl. Ct. 541 (1992)	11, 26
Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (en banc)	*passim*

STATUTES

1 U.S.C. § 109	23, 24, 25
12 U.S.C. § 1437	23, 25, 26
12 U.S.C. § 1464	*passim*
12 U.S.C. § 1725	24
12 U.S.C. § 1728(a) (repealed 1989)	5
12 U.S.C. § 1729	24
12 U.S.C. § 1821	24, 25
Act of May 28, 1935, Pub. L. No. 74-76, 49 Stat. 293	9
Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552	10, 11
Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183	*passim*
Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641	9
Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469	9, 10
National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934)	8

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS	Page
17 C.J.S. Contracts § 34	26
127 Cong. Rec. 25415 (1981) (Statement of Rep. Wylie)	6
Brief for the Petitioner (No. 95-865)	5, 15
Department of Justice Letter to Chairman of House Banking Committee dated June 12, 1989	28
FHLBB, Office of Examinations and Supervision, "Requests for Forbearances and Exceptions to Filing Requirements Regarding Supervisory Institutions," SP-37a, March 7, 1985	10
H.R. Rep. No. 101-54, 101st Cong., 1st Sess., pt. 1 (1989)	29
J. Kent, 1 Commentaries on American Law (1854)	21
Restatement (Second) of Contracts § 71(1) (1981)	26
R. Stern et al., Supreme Court Practice § 4.14	13
Testimony of M. Danny Wall, Director, Office of Thrift Supervision, *Investigation of Lincoln Savings & Loan Association: Hearing Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess., pt. 5 (1989)	6-7
Testimony of Richard T. Pratt, Chairman, Federal Home Loan Bank Board, *Savings and Loan Policies in the Late 1970's and 1980's: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 227 (1990)	6

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OCTOBER TERM, 1995

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v.
WINSTAR CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF *AMICUS CURIAE* OF THE LONG ISLAND SAVINGS BANK, FSB IN SUPPORT OF RESPONDENTS

INTEREST OF THE LONG ISLAND SAVINGS BANK, FSB

The Long Island Savings Bank, FSB ("LISB") is an operating thrift institution with a direct interest in the Court's resolution of the legal issues accepted for review. Consents to file this brief *amicus curiae* have been obtained from the Petitioner and the Respondents. This brief primarily addresses the propriety of the government's *retroactive* application of the goodwill provisions of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (codified in relevant part at 12 U.S.C. § 1464) ("FIRREA").

Like the Respondents, LISB acquired a failing thrift institution in a government-assisted transaction after being solicited by the government to make the acquisition. The government promised LISB significant assistance to make the acquisition possible. By acquiring the failing thrift, LISB saved the government at least $360 million—the amount the government would have had to spend to make the failing thrift's depositors whole.

Also like the Respondents, LISB entered into an acquisition contract, supported by consideration, with the government that granted LISB sted contract rights to apply, for accounting purposes, "supervisory goodwill" toward any future regulatory capital requirements. LISB would not have agreed to acquire the failing institution absent this agreed-upon accounting; indeed, not only would the failing institution acquired by LISB have remained insolvent without LISB's contract rights to treat supervisory goodwill as an asset, but LISB's officers would have been in gross dereliction of their duties to LISB's depositors for having entered into such a financially unfavorable acquisition.

This case has reached the Court because the government subsequently repudiated Respondents' vested contract rights to apply supervisory goodwill toward regulatory capital requirements. The government similarly has repudiated LISB's contract rights concerning supervisory goodwill. LISB was required, at a cost in the hundreds of millions of dollars, to make up the capital deficit created by the government's breach of its agreements to recognize supervisory goodwill for regulatory capital purposes. To recover these damages caused by the government's unjustified actions, LISB has filed suit in the United States Court of Federal Claims against the government. *The Long Island Sav. Bank, FSB, et al. v. United States*, 92-517C (Chief Judge Loren Smith). LISB's suit is stayed pending the outcome of this action. Because the pivotal

legal issues before this Court will directly affect the outcome of LISB's suit against the government, LISB has a great stake in this action. LISB also believes that its views concerning the government's liability for its actions may be of assistance to the Court's consideration of this case.

SUMMARY OF ARGUMENT

In the early 1980's, Congress was faced with the prospect of a severe collapse of the thrift industry and the reality that only limited financial resources were available to bail out failing thrifts. As a result, Congress enacted statutes delegating to thrift regulators broad authority to enter into contractual agreements whereby healthy thrifts, such as Respondents and LISB, would assume the often enormous liabilities of failing thrifts and even contribute additional capital to assist these thrifts. In exchange, healthy thrifts would receive, in lieu of direct financial assistance, significant non-cash benefits, including vested contract rights to apply supervisory goodwill toward thrift capital requirements.

These binding goodwill and other contractual rights were provided by thrift regulators to healthy thrifts pursuant to express statutory authority granted by Congress. These rights also constituted the very essence of the acquisition agreements. The acquisition of failing thrifts by healthy thrifts directly benefitted the government financially; had the failing thrifts actually failed, the government would have been required to spend hundreds of millions of dollars to make the depositors of the failing thrifts whole.

Subsequently, allegedly pursuant to the enactment of FIRREA, the government breached these acquisition agreements by preventing the acquiring thrifts from exercising their vested contractual rights to count goodwill toward their capital requirements. The government now asserts that it was free to breach these vested contract rights without any liability for money damages. However,

as this Court has made clear on numerous occasions, when the government enters into purely commercial business transactions in its capacity as a private contractor, it is just as liable for contract damages as is a private party who breaches a binding contract. Accordingly, the government is not permitted to escape liability for money damages as a result of its breach of these contracts, including Respondents' goodwill accounting agreements.

The government has asserted that the sovereign acts doctrine excuses it from any liability, including payment of money damages, for breach of the Respondents' goodwill accounting contract rights. This doctrine, which excuses the government from liability when a "public and general" sovereign act extinguishes existing contract rights as an incidental and unrelated effect of that act, is not applicable in the case before the Court.

The sovereign act that the government claims protects it from liability for breach of the Respondents' goodwill accounting contract rights is Congress's enactment of FIRREA. The government claims that FIRREA operates retroactively to abrogate Respondents' vested contract rights concerning goodwill and to extinguish Respondents' rights to money damages. However, the Court has long applied a "clear statement" rule that no Congressional statute will be given retroactive effect to abrogate prior vested contract rights or bar the recovery of money damages unless Congress clearly and unambiguously indicates such intent primarily, if not solely, *in the actual text of the statute*. The statutory text of FIRREA discloses no such clear and unambiguous Congressional intent, as numerous federal district and circuit courts have found.

Thus, FIRREA does not support the government's assertion of the sovereign acts doctrine. Instead, thrift regulators acted without statutory authorization in specifically breaching the Respondents' acquisition agreements, and the government is fully liable for all contract damages caused by its breach of these agreements.

ARGUMENT

I. THE RESPONDENTS HAVE VESTED CONTRACT RIGHTS RELATING TO THE RECOGNITION OF SUPERVISORY GOODWILL AND THE GOVERNMENT'S UNJUSTIFIED ABROGATION OF THOSE RIGHTS NECESSARILY GIVES RISE TO A VALID CLAIM FOR MONEY DAMAGES.

A. The Government Granted Vested Contract Rights Concerning Goodwill in an Effort to Resolve a Financial Crisis and Avoid Government Obligations to Depositors of Failing Thrifts.

The government's brief in this case sets forth in detail the nature of the financial ills that faced the thrift industry in the early 1980's. Brief for the Petitioner at 2 (No. 95-865) ("Pet. Br."). During that time period, the Federal Savings and Loan Insurance Corporation (the "FSLIC") was statutorily obligated to insure the deposit accounts of most thrifts up to a maximum of $100,000 per account upon payment of premiums and other costs. 12 U.S.C. § 1728 (a) (repealed 1989). Whenever a thrift failed, the FSLIC was required to reimburse depositors for any lost funds deposited in that thrift, up to $100,000.

The number of insolvent FSLIC-insured thrifts more than tripled in 1981 (from 16 to 53) and more than quadrupled again in 1982 (to 219). The magnitude of insolvencies among federally-insured thrifts made it impossible for the FSLIC simply to close down the failed thrifts and pay off their depositors. It was clear by 1981 that Congress and the responsible federal agencies faced a severe financial crisis in the thrift industry.

1. *The FSLIC's Strategy to Resolve the Thrift Crisis Included Encouraging Healthy Thrifts to Acquire Failing Thrifts.*

In 1981, to stem the rising costs associated with liquidating failing thrifts, costs that threatened to exceed the FSLIC's available reserves, the FSLIC adopted a new

strategy—it encouraged healthy thrifts, such as Respondents and LISB, to acquire failing thrifts, thereby avoiding large assistance payments by the FSLIC. To implement this strategy, the FSLIC obtained expanded statutory authority from Congress that permitted the FSLIC to arrange mergers and acquisitions of failing thrifts before they failed. Congress expanded the FSLIC's authority based on its belief that such arrangements constituted "a cheaper alternative to liquidation" and would thus "save money for the insurance funds." 127 Cong. Rec. 25415 (1981) (Statement of Rep. Wylie).

To attract buyers for failing thrifts, the FSLIC also began to publicize its view that a buying thrift would be permitted to rely on the "purchase method of accounting," including the recording of goodwill as an intangible asset in accordance with Generally Accepted Accounting Principles ("GAAP"). In particular, the FSLIC would contractually agree to recognize goodwill as capital for regulatory purposes in a merger or acquisition as a substitute for cash that it did not have available.

> The Bank Board was caught between a rock and a hard place. While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands, and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. . . . It facilitated mergers without incurring the inordinant [sic] cash costs associated with liquidating institutions during the most unfavorable cyclical peak in American economic history.

Testimony of Richard T. Pratt, Chairman, Federal Home Loan Bank Board, *Savings and Loan Policies in the Late 1970's and 1980's: Hearings Before the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 227 (1990). *See also* Testimony of M. Danny Wall, Director, Office of Thrift Supervision, *Investigation of Lincoln Savings & Loan Association: Hearing Before the*

House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 1st Sess., pt. 5, at 447 (1989) (those healthy thrifts which acquired failing thrifts were permitted to book goodwill "in lieu of [direct] federal financial assistance."). The result of the FSLIC's strategy was a host of individually-negotiated commercial transactions between the FSLIC and private entities like LISB, which could be induced to make otherwise extremely unattractive investments only if such investments were accompanied by strong, binding government commitments.[1]

For example, the FSLIC employed this general strategy in connection with LISB's acquisition in 1983 of a failing thrift, Suffolk County Federal Savings and Loan Association ("Suffolk"). In soliciting bids for Suffolk in December 1982, the government advised potential bidders that the FSLIC only could provide limited financial assistance for the acquisition, notwithstanding that the FSLIC estimated its potential liability should Suffolk fail to be $472.6 million. At that time, Suffolk's liabilities exceeded the market value of its assets by some $625 million.

Obviously, no responsible LISB official could agree to assume such massive liability without a countervailing benefit to render the acquisition a reasonable business transaction. LISB therefore conditioned any acquisition of Suffolk on an agreement by the government that, con-

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[1] Granting goodwill rights supported by consideration to acquiring thrifts was just one of many regulatory devices that the FSLIC used extensively—pursuant to its broad statutory authority—to induce prospective acquirors to proceed with acquisitions of insolvent and otherwise unattractive institutions. In the context of assisted acquisitions of troubled thrifts, regulatory recognition of supervisory goodwill as capital constituted bargained-for commitments governing the future regulatory treatment of the assets, liabilities or capital levels of institutions which were taking over the business of failed institutions. Whether these devices related to legal or financial requirements, they were designed to allow acquirors a specified period of time to overcome financial problems inherited from the failed institution.

sistent with GAAP, the LISB subsidiary that acquired Suffolk could count goodwill as an asset "for any and all regulatory purposes," to be amortized over a 40-year period. Following negotiations with the government, the parties executed an Assistance Agreement that created a vested contract right, supported by consideration, in favor of LISB and its acquiring subsidiary concerning the recognition of goodwill. The government believed it was getting a good deal—it concluded that its cost in connection with this agreement was $75 million, as opposed to a potential immediate cost of $472.6 million if Suffolk failed, and that LISB's bid presented the lowest cost and least risk to the FSLIC of any offer submitted.[2]

2. *The FSLIC Acted Pursuant to Express Congressional Authority in Granting Respondents' Vested Contract Rights.*

In negotiating these transactions, the FSLIC utilized the broad statutory authority granted to it by Congress to guarantee acquirors against loss. From its establishment in 1934 until the effective date of FIRREA in 1989, the FSLIC had authority under the National Housing Act, Pub. L. No. 73-479, 48 Stat. 1246 (1934) ("National Housing Act"), to act as receiver or conservator of insolvent thrifts and to pay off their deposit obligations to the limits of the FSLIC's insurance coverage. *See* National Housing Act § 406, 48 Stat. 1246, 1260. In 1935, the FSLIC's powers were expanded to permit it to act to prevent the insolvency of a troubled thrift by making

[2] The problems to which regulatory forbearances related could also have been resolved by the payment of additional monies by the government, for example to raise capital to standard levels. Such regulatory forbearances were, from the government's point of view, however, attractive "non-cash" acquisition terms that avoided expenditures that otherwise would have been necessary to induce acquisitions of troubled thrifts. Had the FSLIC not used forbearances, it would have had to use cash to induce prospective acquirors to commit to the transaction.

loans to, purchasing the assets of, or making contributions to the troubled institution. *See* Act of May 28, 1935, Pub. L. No. 74-76, 49 Stat. 293, 299.

In 1978, the FSLIC's assistance authority was expanded still further to authorize the FSLIC to "facilitate" the merger or acquisition of a failing thrift, and to that end the FSLIC was empowered to "guarantee" the new owner "against loss by reason of its merging or consolidating with or assuming the liabilities and purchasing the assets of such insured institution in or in danger of default" (hereinafter referred to as "the FSLIC's guarantee-against-loss powers"). *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641, 3647. Congress authorized the FSLIC to provide such guarantees "upon such terms and conditions as the Corporation [FSLIC] may determine," provided, with certain exceptions, that the cost of providing the guarantee against loss did not exceed the cost of liquidating the troubled institution.

On October 15, 1982, in response to the thrift crisis of the early 1980's, Congress enacted the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 ("Garn-St Germain"). Garn-St Germain strengthened still further the FSLIC's guarantee-against-loss powers to "facilitate" mergers and acquisitions of troubled thrifts. The FSLIC was empowered to provide assistance to facilitate the merger or acquisition of an insured thrift when "severe financial conditions exist which threaten the stability of a significant number of insured institutions or of insured institutions possessing significant resources" and assistance would "lessen the risk to the Corporation [FSLIC]." *See* Garn-St Germain § 122, 96 Stat. 1469, 1480-81. Congress also reaffirmed in Garn-St Germain the FSLIC's authority "to enter into and enforce covenants and agreements that it determines to be necessary to protect its financial interests." *Id.* at 1481.

In Garn-St Germain, Congress also granted statutory authority (preempting any state restrictions) for "emergency thrift acquisitions" of an interstate or cross-industry nature (*i.e.*, acquisitions of thrifts by bank holding companies or banks). *See* Garn-St Germain § 123, 96 Stat. 1469, 1483. The FSLIC was empowered to bring about such emergency thrift acquisitions "on such terms as the Corporation [FSLIC] shall provide" whenever certain severe financial conditions existed and such an acquisition "would lessen the risk to the Corporation [FSLIC]." *Id.* To consumate emergency thrift acquisitions, the FSLIC was authorized expressly to "solicit such offers or proposals as are practicable from any prospective purchasers" deemed "qualified and capable," was required to "give consideration to the need to minimize the cost of financial assistance," and was authorized to effectuate such acquisitions "on such terms as [FSLIC] shall provide." *Id.* at 1483-84.

The FSLIC's use, pursuant to broad statutory authority, of regulatory devices relating to goodwill and other credits became so prevalent that the Federal Home Loan Bank Board (the "FHLBB") issued a policy statement in 1986 to guide the negotiators. FHLBB, Office of Examinations and Supervision, "Requests for Forbearances and Exceptions to Filing Requirements Regarding Supervisory Institutions," SP-37a, March 7, 1985, at 1. The policy statement acknowledged: "The basic purpose in granting forbearances is to give realistic incentives to potential acquirors of problem institutions." *Id.* at 2.

Congress was aware that the FSLIC was using forbearances and other devices as tools to resolve the thrift crisis. For example, in passing the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 552 ("CEBA"), Congress directed the FHLBB to promulgate regulations providing that certain federally-chartered thrifts may "be allowed to continue to operate and be eligible for capital forbearance" if certain conditions were met. CEBA § 404, 101 Stat. 552, 609-11, *repealed by* FIRREA § 301, 103 Stat. 183, 277-354. CEBA provided similar authority to the FSLIC for state-chartered thrifts. CEBA § 416, 101 Stat. 552, 611-13, *repealed by* FIRREA § 407, 103 Stat. 183, 363. Furthermore, in CEBA Congress legislatively recognized and extended certain forbearances and other capital requirement rights provided by the FSLIC to acquirors in emergency thrift acquisitions under § 408(m) of the National Housing Act for a five-year period if certain conditions were met. CEBA § 414, 101 Stat. 552, 621-22, *repealed by* FIRREA § 407, 103 Stat. 183, 363. Thus, it was clear government policy, both administratively and Congressionally, to provide contractually-binding forbearances and other capital rights to the acquirors of thrifts in appropriate circumstances.

B. The Respondents' Vested Contract Rights Concerning Goodwill Were Breached, for Which the Government Cannot Escape Liability.

The Federal Circuit in the decision under review, and the Court of Federal Claims below, found that the Respondents had entered into binding government contracts that granted Respondents vested contract rights concerning the accounting treatment of goodwill. *Winstar Corp. v. United States*, 64 F.3d 1531, 1540-43 (Fed. Cir. 1995) (en banc); *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904, 911-12 (1992); *Winstar Corp. v. United States*, 25 Cl. Ct. 541, 548 (1992); *Winstar Corp. v. United States*, 21 Cl. Ct. 112, 114-17 (1990).

Numerous other related cases in the federal courts have also involved similar contracts. *See, e.g., Far West Fed. Bank, SB v. Director, OTS*, 951 F.2d 1093, 1095 (9th Cir. 1992) (assuming contract exists); *Guaranty Fin. Servs., Inc. v. Director, OTS*, 742 F. Supp. 1159, 1161 (M.D. Ga. 1990) (same), *rev'd on other grounds*, 928 F.2d 994 (11th Cir. 1991); *Far West Fed. Bank, SB v.*

Director, OTS, 738 F. Supp. 1559, 1562 (D. Or. 1990) (same), *rev'd on other grounds*, 951 F.2d 1093 (9th Cir. 1991); *Far West Fed. Bank, SB v. Director, OTS*, 746 F. Supp. 1042, 1045 (D. Or. 1990) (same), *rev'd on other grounds*, 951 F.2d 1093 (9th Cir. 1991); *Carteret Sav. Bank, FA v. OTS*, 762 F. Supp. 1159, 1173 (D.N.J. 1991) (finding a contract to exist), *vacated on other grounds*, 963 F.2d 567 (3d Cir. 1992); *Hansen Sav. Bank v. OTS*, 758 F. Supp. 240, 246 (D.N.J. 1991) (same); *Security Sav. and Loan Ass'n v. Director, OTS*, 761 F. Supp. 1277, 1279 (S.D. Miss. 1991) (same), *modified on other grounds*, 960 F.2d 1318 (5th Cir. 1992); *Security Fed. Sav. Bank of Florida v. Director, OTS*, 747 F. Supp. 656, 658 (N.D. Fla. 1990) (same); *Franklin Fed. Sav. Bank v. Director, OTS*, 1990 U.S. Dist. LEXIS 20147, *2 (E.D. Tenn. 1990) (same), *rev'd on other grounds*, 927 F.2d 1332 (6th Cir. 1991); *Sterling Sav. Ass'n v. Ryan*, 751 F. Supp. 871, 878 (E.D. Wash. 1990) (same), *vacated on other grounds*, 1992 U.S. App. LEXIS 6982 (9th Cir. 1992). *See also Franklin Fed. Sav. Bank v. Director, OTS*, 927 F.2d 1332, 1345 (6th Cir.) (Contie, J., dissenting), *cert. denied*, 112 S. Ct. 370 (1991).

By contrast, courts have rarely found against thrifts that have claimed to have binding contract rights relating to goodwill or other regulatory forbearances, and when they did, the decisions were based on unique facts that are distinguishable from the facts underlying Respondents' goodwill accounting agreements. *Charter Fed. Sav. Bank v. OTS*, 976 F.2d 203 (4th Cir. 1992) (clearly distinguishing facts in that case concerning contract formation from the relevant facts of the case before the Court), *cert. denied*, 507 U.S. 1004 (1993); *Guaranty Fin. Servs., Inc. v. Ryan*, 928 F.2d 994, 998 (11th Cir. 1991) (express provision in contract permitted government to alter regulatory requirement concerning accounting treatment of goodwill); *Flagship Fed. Sav. Bank v. Wall*, 784 F. Supp. 742, 748 (S.D. Cal. 1990) (no contract based on facts

distinguishable from the relevant facts of the case before the Court). *Cf. Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52, 54-55 (1986) ("*POSSE*") (holding that non-vested rights pursuant to statute that are not obtained pursuant to consideration are not enforceable contract rights; thus, government can revoke such rights at any time without liability).

The government sought certiorari on matters of principle and importance: the Federal Circuit's alleged failure to apply the unmistakability doctrine; the authority of the regulators to enter into contracts; the sovereign acts doctrine; and the magnitude of the pending claims of other thrifts such as Respondents and LISB. However, once before the Court, the government has switched the thrust of its arguments to question whether in fact the Respondents entered into agreements concerning goodwill that constitute legally binding contracts.

The Court has expressly ruled on numerous occasions that it does not grant certiorari simply to review a lower court's determination of relevant facts, including the construction of a contract. *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Baker v. Schofield*, 243 U.S. 114, 118 (1916); *United States v. O'Donnell*, 303 U.S. 501, 508 (1938); R. Stern *et al.*, Supreme Court Practice § 4.14, at 189 (7th ed. 1993) ("The Supreme Court will usually deny certiorari when review is sought of a lower court decision which turns solely . . . upon the construction of particular contracts or written instruments."). The Court has been particularly reluctant to "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) (citing *Baker*, 243 U.S. at 118) (holding that the court will not "disturb" a ruling on the construction of a contract "when [the] two courts [below] have reached the same conclusion."), *aff'd*, 339 U.S. 605 (1950).

The government in its petition for certiorari did not indicate, when it listed the three questions it presented for

Court review, that the existence of contracts between the Respondents and the government would be an issue on which it would spend its principal briefing effort. It is improper to first raise this fact-bound issue at the briefing stage. The Respondents are now compelled to address these issues in their responding briefs, thereby impairing the Respondents' ability fully to respond to the government's legitimately-presented (but also erroneous) arguments. Moreover, it is possible that certain important, even critical, documenatry evidence relating to the contracts may not have been included in the Joint Appendix provided to the Court.

Nevertheless, the government's attacks on the Respondents' acquisition agreements are without weight. These agreements are commercial contracts to which the government is a party in its capacity as a commercial contractor. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925) (quoting *Jones v. United States*, 1 Cl. Ct. 383, 384 (1965)) (" '[I]n this court, the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court.' ").

As such, the government is not permitted to escape liability for monetary damages as a result of its breach of goodwill accounting obligations. *See Lynch v. United States*, 292 U.S. 571, 576, 580 (1934) (contractual duties of the United States "are governed generally by the law applicable to contracts between private individuals. . . . To abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy, but an act of repudiation."); *Perry v. United States*, 294 U.S. 330, 350 (1935) (the government is not "free to . . . alter the terms of its obligations in case a later Congress finds their fulfillment inconvenient"); *POSSE*, 477 U.S. at 52 (valid government contracts backed by substantial consideration create enforceable property rights); *Sinking-Fund Cases*, 99 U.S. 700, 719 (1878)

("The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.").

II. THE SOVEREIGN ACTS DOCTRINE DOES NOT EXCUSE THE GOVERNMENT FROM LIABILITY BECAUSE FIRREA'S TERMS CONCERNING GOODWILL DO NOT UNAMBIGUOUSLY ABROGATE PRE-EXISTING VESTED CONTRACT RIGHTS AND THUS CANNOT BE GIVEN RETROACTIVE EFFECT.

The government, in its brief, invokes the sovereign acts doctrine to excuse the government from any liability under the Respondents' goodwill accounting agreements. Pet. Br. at 43-46. As the government explains, the "primary qualification on the doctrine is that the sovereign act relied upon to excuse performance be a 'public and general' one." *Id.* at 44. The government concedes that, if the sovereign act is not public and general, and merely enables the government to evade contractual obligations, the doctrine is inapplicable and "the government's breach is actionable." *Id.* at 44.[3] Moreover, the sovereign acts doctrine requires that the sovereign act be unrelated and incidental to the private contract rights that were abrogated. *See Horowitz*, 267 U.S. at 461.

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[3] In the Federal Circuit's view, FIRREA was not a public and general act of the kind that would permit application of the sovereign acts doctrine. *Winstar Corp.*, 64 F.3d at 1550. The Federal Circuit found that FIRREA itself phased out the use of supervisory goodwill and thereby specifically breached the government's obligations contained in the Respondents' acquisition agreements. *Id.* at 1549-50. However, the Federal Circuit reached this conclusion only after a thorough review of the relevant legislative history of FIRREA. *Id.* at 1549-50. In addition, because the Federal Circuit rejected the applicability of the sovereign acts doctrine on this ground, it was not required to decide the issue of whether the Court's clear statement rule on retroactivity should be applied when construing FIRREA's effect on prior vested contract rights concerning goodwill.

As demonstrated below, Congress did not unambiguously establish, in the statutory text and legislative history of FIRREA, that FIRREA's goodwill rules were to have retroactive effect and override previously agreed upon contractual terms concerning goodwill set forth in the Respondents' acquisition agreements. Thus, the Office of Thrift Supervision's (the "OTS's") improper agency action to breach its contractual obligations concerning goodwill, on the alleged ground that FIRREA required such agency action,[4] directly conflicts with this Court's "clear statement" rule that retroactive abrogation of prior contract rights by Congressional statute will only be recognized if Congress calls for such abrogation clearly and unambiguously.

Under these circumstances, the sovereign acts doctrine obviously cannot excuse the government for breach of the Respondents' acquisition agreements. Congress, with FIRREA, did not enact a "public and general" law that had an unrelated, collateral effect of abrogating vested contract rights. Moreover, the OTS's improper interpretation of FIRREA to abrogate the Respondents' vested goodwill rights obviously cannot itself constitute a public and general act having an unrelated, collateral effect on such rights; the OTS's action instead, by its own admission, was directly targeted at breaching these rights.

A. The "Clear Statement" Rule Concerning Retroactivity Is Applicable to the Construction of FIRREA.

It is well-established by this Court that when Congress intends to upset previously settled expectations, including vested contract rights held by private parties to government contracts, Congress must indicate its intent that a law have retroactive effect in unambiguous terms. *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483, 1505 (1994); *Georgetown*, 488 U.S. at 208. This "clear statement" rule derives from the general proposition that Congress will not be ascribed intentions that have potentially serious, harmful or unsettling effects—such as the destruction of pre-existing vested contract or property rights—unless Congress expresses the intent to do so clearly and expressly in the statutory text. As this Court has ruled:

> Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.

Georgetown, 488 U.S. at 208 (citing *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928)).

The Court also has explained when to apply a statute retroactively where the statute purports to grant administrative rule-making authority:

> By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. *See Brimstone R. Co. v. United States*, 276 U.S. 104, 122 (1928) ("The power to require readjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words"). Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant.

Georgetown, 488 U.S. at 208-09.

Moreover, in applying the clear statement canon to the issue of a statute's retroactivity, the deference typically

[4] It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

applied by courts to agencies in interpreting a statute is not applicable. *Transohio Sav. Bank v. Director, OTS*, 967 F.2d 598, 614 (D.C. Cir. 1992) (citing *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987)) ("In *National Fuel Gas*, Judge Bork explained for the Court that 'deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract.' "). *Cf. Georgetown*, 488 U.S. at 213 ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.").

The Court most recently addressed the appropriate application of this clear statement canon in *Landgraf*. In analyzing the retroactive effect of amendments to the Civil Rights Act, the Court prescribed the following framework to determine whether a Congressional statute should be applied retroactively: [5]

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted . . . or impose new duties with respect to transactions already completed. If the statute would

[5] The Court in *Landgraf* explained that its clear statement canon concerning retroactivity is based primarily on two policy rationales. First, the Court indicated that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Second, the Court expressed its justifiable concern that Congress, in response to political pressure, "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 114 S. Ct. at 1497.

> operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 1505.

In *Landgraf*, the Court then went on to determine that the statute at issue did not provide express instructions concerning retroactivity but would have retroactive effect if applied by impairing the rights of private parties. The Court refused to apply the statute at issue retroactively and concluded that it found "no clear evidence of congressional intent" to justify such retroactive application. The Court also indicated that a statute will not be read retroactively to modify the right to recover money damages (whether by increasing or decreasing the amount recoverable), unless Congress provides a clear statement to that effect. *Id.* at 1507 n.37 ("The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored . . . '[r]etroactive modification' of damage remedies may 'normally harbo[r] much less potential for mischief than retroactive changes in the principles of liability,' . . . but that potential is nevertheless still significant." (citations omitted) (emphasis in original)).

Significantly, under *Landgraf*, if the statutory text enacted by Congress does not clearly mandate retroactive abrogation of pre-existing rights, reliance on legislative history to overcome such lack of clear intent in the text is rarely, if ever, justified.[6] Otherwise, this clear statement rule is eviscerated; the Court would then simply be apply-

[6] The Court in *Landgraf*, while conducting a cursory review of legislative history, essentially treated it as unreliable:

> The legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.

Id. at 1495.

ing, in determining whether a statute should be applied retroactively, ordinary statutory interpretation rules, rather than the special clear statement rule, to determine the intended meaning and effect concerning the retroactivity of an ambiguous statute.[7] The clear statement retroactivity rule has long required that the clear statement of Congressional intent reside primarily in the text of the statute subject to interpretation. *See Landgraf*, 114 S. Ct. at 1522-23 (Scalia, J., concurring) (citing *United States v. Heth*, 3 Cranch 399, 408 (1806) (Johnson, J.) ("Unless therefore, the words are too imperious to admit of a different construction, [the Court should] restrict the words of the law to a future operation"); *Id.* at 414 (Cushing, J.) ("It [is] unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose"); *Murray v. Gibson*, 15 How. 421, 423 (1854) (statutes do not operate retroactively unless "required by express command or by necessary and unavoidable implication"); *Schwab v. Doyle*, 258 U.S. 529, 537 (1922) ("a statute should not be given retrospective operation unless its words make that imperative")).

[7] Justice Scalia's concurring opinion in *Landgraf* (joined by Justices Kennedy and Thomas) cautions that a clear statement concerning retroactive application of a statute must be supplied by the statutory text and not by a resort to legislative history, lest the clear statement rule be converted into a "discernible legislative intent" rule. Justice Scalia then indicates his view that the clear statement test for retroactivity precludes reference to legislative history and that this rule was not changed by the majority Court's reference to legislative history in its opinion:

> If it is a "clear statement" we are seeking, surely it is not enough to insist that the statement can "plausibly be read as reflecting general agreement"; the statement must clearly reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest of times.

Id. at 1522 (Scalia, J., concurring).

Numerous other cases specifically indicate that a statute must not be read lightly to abrogate pre-existing contract rights. *The Twenty Per Cent Cases*, 87 U.S. (20 Wall.) 179, 187-88 (1883) ("there is not a word in the repealing act to support the conclusion that Congress intended to rescind any antecedent contract, or to enact any bar to the right of recovery in such cases where the service had been faithfully performed before the repealing act was passed."); *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (the Court will not give a statute retrospective operation if it injures "rights previously vested . . . unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature"); *United States Fidelity & Guar. Co. v. United States*, 209 U.S. 306, 314 (1908) (a statute will not be read to abrogate pre-existing contract rights "unless the words used are so clear, strong and imperative that no other meaning can be annexed to them" and "ought not to receive such a construction if it is susceptible to any other"); *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be the 'unequivocal and inflexible import of the terms'" (citations omitted)). *See also* J. Kent, 1 Commentaries on American Law 455-56 (1854) (remedial statutes may have retroactive effect "provided they do not impair contracts, or disturb absolute vested rights").

B. FIRREA Does Not Expressly Abrogate Vested Contract Rights Concerning Goodwill.

An analysis of the terms of FIRREA reveals that Congress enacted no express provision requiring the OTS to extinguish, retroactively, (i) the vested contract rights of the Respondents (and other thrifts) concerning the recognition of supervisory goodwill or (ii) the right of Respondents to recover money damages as a remedy for breach of such vested rights.[8]

[8] If the Court determines that Congress did not, with FIRREA, *require* the OTS to breach the vested goodwill rights of the Re-

FIRREA did establish a schedule to reduce, over several years, the recognition of supervisory goodwill as contributing to a thrift's capital requirements, apparently applicable "uniformly" to thrifts. FIRREA § 301 (amending 12 U.S.C. § 1464(t)(3)(A)).[9] FIRREA also provided in § 301 that OTS had limited discretion to waive certain minimum capital levels required by Congress on a "case-by-case" basis. FIRREA § 301 (amending 12 U.S.C. § 1464(t)). In addition, thrifts that were not in compliance with capital standards were permitted to apply for an OTS exemption from certain capital standards or from penalties for noncompliance that OTS might otherwise impose. FIRREA § 301 (amending 12 U.S.C. § 1464(t)(7)).

However, § 301's scheduled general phase-out of goodwill is not sufficient to justify a conclusion that, by implication, Congress intended to abrogate the terms of the Respondents' acquisition agreements. For example, pre-FIRREA capital requirements applying to "all" thrifts also existed in the law; yet, such requirements were frequently waived by the OTS and were not indicative of the actual capital requirements that applied to thrifts.[10] *See* 12 U.S.C. § 1464(t) (repealed 1989).

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spondents and other thrifts, federal district courts theoretically could grant injunctive relief and require the OTS to specifically perform its acquisition agreements with thrifts by recognizing such goodwill rights. However, because several years have passed since the OTS breached the acquisition agreements, many thrifts have been placed in receivership or have taken other irreversible steps to compensate for the OTS's breach. Thus, virtually all affected thrifts, including Respondents and LISB, seek money damages rather than injunctive relief as the remedy for the OTS's breach.

[9] The transition rules in § 301 provided for a phase-out of goodwill as a component of regulatory capital over five years and restricted amortization of goodwill to no more than 20 years. FIRREA § 301 (amending 12 U.S.C. §§ 1464(t)(3)(A), (t)(9)(B)).

[10] Other than as possibly set forth by implication in § 301, FIRREA is silent with respect to the intended retroactive effect of

On the other hand, a compelling argument can be made that Congress enacted FIRREA's "savings clauses" to preserve the contractual rights concerning goodwill set forth in the Respondents' acquisition agreements. Under Title IV of FIRREA, entitled "Transfer of Functions, Personnel and Property," Congress abolished the FSLIC and the FHLBB and enacted savings clauses providing that the abolition of these agencies "shall not affect the validity of any right, duty, or obligation" of the United States, including the FSLIC or the FHLBB, which "existed on the day before the date of the enactment of this Act." FIRREA §§ 401(f), (g) (12 U.S.C. § 1437 note). Savings clauses are entitled to broad construction. *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 389-90 (1953).

The general federal savings statute also should be read to preserve the validity of the Respondents' goodwill accounting rights. In *De La Rama*, the Court applied the general federal savings statute, set forth at 1 U.S.C. § 109, to conclude that, even if Congress repeals a statute pursuant to which a prior contractual obligation of the government was created, the government remains liable under that obligation unless Congress expressly provides otherwise in the text of the repealing statute. *Id.* at 388-89. Section 109 provides that:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or *liability* incurred under such statute, *unless the repealing Act shall so expressly provide*, and *such statute shall be treated as still remaining in force* for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109 (emphasis added).

The Court applied § 109 in *De La Rama* to hold that a government contractor was entitled to money damages

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the goodwill requirements on the acquisition agreements or on the right to recover money damages for breach of such agreements.

from the United States when Congress repealed the statute pursuant to which the relevant contract was created.[11] This case is indistinguishable from *De La Rama*. Two federal statutory provisions repealed by FIRREA—12 U.S.C. §§ 1725(c)(3) and 1729(f)(2)(A)(iii)—had authorized FSLIC to enter into binding acquisition agreements with Respondents, the LISB and other healthy thrifts. Yet, FIRREA did not "expressly provide" that such repeal "shall have the effect to release or extinguish any . . . liability [of the government] incurred under" the two provisions repealed by FIRREA. Thus, it follows inexorably from the Court's ruling in *De La Rama* that, notwithstanding Congress' later repeal via FIRREA of the FSLIC's statutory authority to enter into binding acquisition agreements, the government's goodwill obligations under such contracts survive such repeal.

By contrast, Congress enacted express language elsewhere in FIRREA that the Federal Deposit Insurance Corporation (the "FDIC"), when acting as conservator or receiver of a failed thrift, could repudiate prior contract or lease obligations not of the FSLIC but of the thrift itself. FIRREA § 212(a) (amending 12 U.S.C. § 1821(e)). Thus, within the four corners of the same legislation, Congress obviously demonstrated an understanding of how to indicate—without any ambiguity—its intent to abrogate contract rights retroactively or to limit the right to recover

[11] The Court explained that § 109:

> lays down a general rule regarding the implications for existing rights of the repeal of the law which created them. It embodies a principle of fair dealing. When the Government has entered upon a conventional commercial endeavor, such as the insurance business, it as much offends standards of fairness for it to violate the principles of [§ 109] as for prviate enterprise to do so.

De La Rama, 344 U.S. at 389.

money damages for breach.[12] The absence of such express language in § 301 (amending 12 U.S.C. § 1464), the provision that established the rules concerning recognition of goodwill, strongly suggests that Congress simply could not, perhaps in the interest of political compromise,[13] expressly authorize the OTS to abrogate vested contract rights concerning goodwill.[14] *See O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2054 (1994) (Court relies on the specificity of the language of § 1821(e) to demonstrate that "creat[ing] additional 'federal common-law' exceptions is not to 'supplement' [FIRREA], but to alter it."). *Cf. Georgetown*, 488 U.S. at 213 (failure of Congress explicitly to authorize retroactive application of one rule when it explicitly authorized retroactive action of another rule "weighs heavily against the [agency's] position").

It is certainly reasonable to read § 401 of FIRREA (12 U.S.C. § 1437 note) and 1 U.S.C. § 109 as preserving the Respondents' goodwill rights under their acquisition agreements.[15] In fact, virtually every federal district and

[12] FIRREA expressly acknowledged that the parties to these repudiated thrift contracts or leases were entitled to some recovery of money damages arising from the repudiation. FIRREA § 212(a) (amending 12 U.S.C. § 1821(e)(8)). That Congress failed to provide parallel guidance concerning money damages upon abrogation of goodwill accounting agreements suggests that Congress did not mandate that such agreements be abrogated.

[13] One possibility is that Congress was unable to resolve the retroactivity issue with clarity and thus "viewed the matter as an open issue to be resolved by the Courts." *See Landgraf*, 114 S. Ct. at 1494.

[14] In addition, in § 501 of FIRREA, a section relating to the Resolution Trust Corporation ("RTC"), FIRREA explicitly withheld authority for the RTC to repudiate pre-existing assistance agreements, including agreements concerning goodwill. This again indicates that Congress clearly expressed its intent regarding retroactive repudiation of vested contract rights when it was politically feasible to do so.

[15] By no means does this reading of § 301 render this provision without effect. Thrift regulators had extended to a number of

circuit court analyzing the statutory text of FIRREA has concluded either that (i) § 401 of FIRREA (12 U.S.C. § 1437 note) expressly preserves thrifts' goodwill rights under valid acquisition agreements [16] or (ii) FIRREA's statutory text is simply inconclusive and provides no clear guidance as to whether Congress intended to abrogate the government's contractual obligations concerning goodwill.[17] We are aware of only one case that squarely faced

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thrifts the right to count goodwill toward their capital requirements in a gratuitous exercise of agency discretion. With respect to these thrifts, the bank regulators could simply revoke these non-vested rights concerning goodwill at any time without liability. *Winstar Corp.*, 64 F.3d at 1546; *Winstar Corp.*, 25 Cl. Ct. at 545-46 (citing *Estate of Samuel E. Bogley v. United States*, 206 Cl. Ct. 695, 704-05 (1975); Restatement (Second) of Contracts § 71(1) (1981); 17 C.J.S. Contracts § 34). It is perfectly proper to assume that Congress provided a transition period to phase-out these gratuitous rights concerning goodwill. *Cf. POSSE*, 477 U.S. at 55-56 (in which the Court ruled that gratuitous rights granted by the government to private parties without contractually-binding consideration could be revoked without liability). Of course, the Respondents' rights to apply goodwill toward capital requirements were obtained under acquisition agreements supported by consideration and thus constituted vested contract rights. *Winstar Corp.*, 64 F.3d at 1546; *Winstar Corp.*, 25 Cl. Ct. at 545-46.

[16] *See Hansen Sav. Bank*, 758 F. Supp. at 246 (holding that section 401(g) of FIRREA preserves goodwill agreements); *Security Sav. and Loan*, 761 F. Supp. at 1284 (same); *Guaranty Fin. Servs.*, 742 F. Supp. at 1162 (same); *Security Fed.*, 747 F. Supp. at 659 (same); *Far West Fed.*, 738 F. Supp. at 1563 (same); *Far West Fed.*, 746 F. Supp. at 1047 (confirming position taken in previous decision that FIRREA preserves goodwill agreements); *Franklin Fed.*, 1990 U.S. Dist. LEXIS at *3 (FIRREA does not abrogate forbearances); *Sterling Sav.*, 751 F. Supp. at 880 (holding that FIRREA did not abrogate goodwill agreements or give the OTS the power to do so). *See also Franklin Fed.*, 927 F.2d at 1343 (Contie, dissenting) (stating that the statute unambiguously preserved goodwill agreements in section 401).

[17] At least seven courts including the Third, Fourth, Sixth, Ninth and Eleventh Circuits, have ruled that FIRREA's statutory text is ambiguous as to whether goodwill agreements are abrogated or preserved. *See, e.g., Carteret Sav. Bank, FA v. OTS*, 963 F.2d 567, 578 (3d Cir. 1992) (stating that "the statutory language relied upon by [the agency] is not conclusive"); *Charter Fed.*, 976 F.2d at 210 (accepting the analysis of the lower court and other circuit courts, which found that FIRREA is ambiguous); *Franklin Fed.*, 927 F.2d at 1341 (implying that the statute is subject to more than one reasonable interpretation); *Far West Fed.*, 951 F.2d at 1097 (relying on legislative history and the purposes for which FIRREA was enacted, as well as "the language and structure of FIRREA," to support a construction of the act that the statute abrogates the contracts); *Guaranty Fin. Servs.*, 928 F.2d at 1003 (stating that "[the court] conclude[s] that the statute is ambiguous on the question of whether contractual forbearances are abrogated or saved."); *Carteret Sav. Bank*, 762 F. Supp. at 1176 (stating that "[t]his Court has already determined that the statute in question is ambiguous."); *Charter Fed. Sav. Bank v. Director, OTS*, 773 F. Supp. 809, 823 (1991) ("This court does not believe Congress' intent regarding the use of supervisory goodwill is so clear that the interpretation chosen by the OTS is the only one possible."), *modified*, 976 F.2d 203 (4th Cir. 1992).

the issue of whether FIRREA expressly abrogates vested contract rights concerning goodwill and found that the text of the statute unambiguously directs such abrogation. *See Transohio Sav. Bank v. Director, OTS*, 967 F.2d at 614 ("In our view, FIRREA's language clearly conveys Congress' intention to apply the new capital rules to all thrifts, including those with forbearance agreements").[18]

While several federal circuit courts subsequently rely on individual statements of members of Congress to con-

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[18] The court in *Transohio* failed to address, and presumably overlooked, the distinct possibility that FIRREA's provisions revoking the right to treat goodwill toward capital requirements applied only to such rights granted by bank regulators gratuitously and not to contractually-binding goodwill rights supported by consideration. *See, supra*, note 14. In addition, because the court only affirmed the lower court's determination of the *likelihood* of success on the merits in the context of a preliminary injunction motion, the court's ruling has only limited precedential value. Moreover, the D.C. Circuit later expressly ruled that the *Transohio* decision left open the issue of the retroactive effect of FIRREA's goodwill provisions on claims for contractual damages. *See Transcapital Fin. Corp. v. Director, OTS*, 44 F.3d 1023, 1026 (D.C. Cir. 1993) (later proceeding in same case).

clude that it is more reasonable (in choosing among more than one reasonable alternative) to conclude that Congress intended to abrogate pre-existing contract rights concerning goodwill, that result derives from an application of the general rules of statutory interpretation in the ordinary course, and not from an application of this Court's special clear statement rule governing retroactivity as set forth in *Landgraf*.[19]

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[19] FIRREA's legislative history is hardly unambiguous. Senate reports provide no guidance at all on the issue of retroactive application of the goodwill restrictions. In addition, the report of the House Banking Committee, the House committee principally responsible for drafting FIRREA, is silent on this issue, as is the more important House/Senate Conference Committee report. Thus, to conclude that FIRREA abrogated retroactively vested contract rights concerning goodwill, the federal circuit courts were forced to rely on (i) politically-motivated comments of individual House members that were attached to the House Banking Committee Report and (ii) on a House rejection of an amendment offered by Rep. Hyde that would have provided for administrative review on a case by case basis of whether breach of an acquisition agreement was justified. As this Court counseled in *Landgraf*, statements from individual members are "frankly partisan" and cannot be read to reflect "any general agreement." 114 S. Ct. at 1495. Further, the court has rejected agency reliance on statements in Congressional committee reports stating that "it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *NLRB v. Healthcare & Retirement Corp.*, 114 S. Ct. 1778, 1784 (1994).

As for the Hyde amendment, its rejection does not indicate a clear Congressional view that contract rights concerning goodwill are to be abrogated retroactively. It is equally conceivable that the amendment was rejected because it was unnecessary to grant thrifts a separate right to have a hearing, since thrifts that were party to an acquisition agreement always would be able to seek judicial relief for any breach of such agreement. *See* Department of Justice Letter to Chairman of House Banking Committee dated June 12, 1989 (prior to enactment of FIRREA) ("[T]here is no need to amend FIRREA to provide special hearings on the claims before imposition of the new capital requirements. The federal courts are available to resolve constitutional and contractual claims presented by adversely affected thrifts.").

Even if the government were correct in arguing that a more reasonable interpretation of FIRREA, based on legislative history, is that Congress intended to abrogate vested contract rights contained in the Respondents' acquisition agreements, the government would not thereby meet its burden here. First, the government must satisfy the higher standard established by the Court's clear statement retroactivity rule by demonstrating that FIRREA expressly and clearly calls for retroactive application to vested contract rights concerning goodwill.[20] As the virtually unanimous judgments of numerous federal district and circuit courts confirm, such an unambiguous interpretation of FIRREA is simply not justified or reasonable.

Second, FIRREA is silent with respect to the Respondents' right to money damages for the government's breach of the Respondents' goodwill accounting rights. Nor is there any indication in FIRREA's legislative history that suggests any clear Congressional intent to abolish the Respondents' contractual rights to money damages as a consequence of such breach.[21] Therefore, even if the Court's

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[20] Obviously, if a statute's *text* is unclear as to its retroactive effect on vested contract rights, it is highly unlikely that relevant legislative history—notoriously subject to a wide range of interpretations based on different motivations—will sufficiently "clarify" a statute to allow it to destroy existing contract rights retroactively. The Court has admonished that "[i]f the absence of such determining declaraction [concerning retroactive applicability] leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive application must be selected." *Schwab*, 258 U.S. at 534-35.

[21] In fact, at least on House Banking Committee member believed that the government *would* remain liable for money damages upon breach of thrift acquisition agreements. *See* H.R. Rep. No. 101-54, 101st Cong., 1st Sess., pt. 1, at 507-08 (1989) (Rep. LaFalce). ("[Thrift acquisition agreements] generally state that they cannot be superseded by subsequent regulations. It is a fundamental principle of law that damages are in order when a contract is breached, and those damages may well be more onerous where the contract was induced by the government.").

clear statement standard is met concerning repudiation of these agreements by FIRREA, it remains unsatisfied with respect to the Respondents' right to receive money damages.

Under *Landgraf*, these conclusions should end the inquiry. Without unmistakable Congressional intent to abrogate vested contract rights, including rights to money damages for breach, FIRREA may not be applied retroactively and the sanctity of the Respondents' acquisition agreements must be preserved. Accordingly, the OTS acted without Congressional authorization in specifically breaching the Respondents' vested contract rights concerning goodwill, and the government is not entitled to the protections of the sovereign acts doctrine. *Cf. RTC v. FSLIC*, 25 F.3d 1493, 1501-02 (10th Cir. 1944) (Even if FIRREA does not expressly abrogate vested contract rights concerning goodwill, breach of such rights by the OTS still subjects the government to liability).

CONCLUSION

For the foregoing reasons, LISB urges the Court to affirm the finding of the Court of Federal Claims and the Federal Circuit (en banc) that the government is liable for breach of the Respondents' vested contract rights concerning goodwill.

Respectfully submitted,

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